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PRESUMPTION OF A LOST GRANT—A METHOD OF REPAIRING THE CHAIN OF TITLE

The doctrine of presumption of a lost grant can, in many cases, be applied for the purposes of settling a disputed title. In the absence of a previous deed or grant from the first grantor in claimant's chain of title, it is a general rule that long-continued, undisturbed possession of real property, accompanied by the usual claim and acts of ownership, or by *other corroborating circumstances*, justifies the presumption of a lost grant of the property in question to the claimant or his predecessors in title. A presumption of a lost grant may be operative even though the "adverse" claimant is the United States, a state, or a municipality.

*Richard v. Williams*¹ is one of the earliest cases to discuss the nature of a lost grant.

Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration, that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of existing adverse title in, the party in possession.²

In discussing the lost grant, most courts base their reasoning on the case of *Fletcher v. Fuller*.³ Therefore, a detailed examination of this case is very helpful in understanding the presumption of a lost grant.

The case of *Fletcher v. Fuller* held that it was error to refuse to instruct the jury that the presumption of a lost deed was not necessarily restricted to what might fairly be supposed to have occurred, but rather encompassed what *might* have occurred and seemed necessary to quiet title in the possessor. An analysis of *Fletcher v. Fuller* indicates that the Court, in applying the rules as to presumption of lost grant, concerned itself with several factors:

(1) The possessor of land is probably in possession under a deed or other muniment of title which has been mislaid or lost. This conclusion is reasonable since owners of real property do not usually allow others to possess such property for a long period of time and exercise acts of ownership over it, without permission or consideration.⁴ (2) Actual proof of

¹ 20 U.S. (7 Wheat.) 59 (1822).

² *Id.* at 49-51. See also 2 C.J.S. *Adverse Possession* § 231 (1936).

³ 120 U.S. 534 (1887).

⁴ *Id.* at 545-6: "The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, there-

the execution is not necessary, it is sufficient if the conveyance *might* have been executed.⁵ (3) If not rebutted, the presumption of a lost grant is so strong that the jury may be instructed that it is their duty to presume such a conveyance.⁶ (4) In order for the presumption to obtain the possession must have been "actual, open and exclusive for the period prescribed by the statute of limitations to bar an action for the recovery of land. . . ."⁷ (5) Possession of the property can occasionally be interrupted, if, in addition to possession, there were other open acts of ownership and the interruptions "did not impair the uses to which the possessor subjected the property. . . ."⁸

fore, possession and use are long continued, they create a presumption of lawful origin, that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with the promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost."

⁵ *Id.* at 547: "It is not necessary, therefore . . . in order to presume a conveyance, to believe that a conveyance was in point of fact executed. It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed and that its existence would be a solution of the difficulties arising from its non-execution." In *Commodores Point Terminal Co. v. Hudnall*, 283 Fed. 150, 195 (5th Cir. 1922), the court states that it is sufficient if the execution of such a conveyance was "legally possible." *Superior Oil Co. v. Harsh*, 126 F.2d 572, 574 (7th Cir. 1942), specifically says that, "actual proof of an execution of a conveyance is not necessary." See also *supra* note 1.

⁶ *Supra* note 3, at 555: "Our conclusion is, that the claim to the land in controversy by the defendants and their ancestors in title, for over a century, with the payment of taxes thereon, and acts of ownership suited to the condition of the property, and its actual use for thirty-six or twenty-eight years, it matters not which, would justify a presumption of a deed to the original ancestor, Jeremiah Richardson, to quiet the possession of the defendants claiming under him, and the jury should have been permitted to presume such a deed without finding from the testimony that there was in point of fact a deed which was lost. If the execution of a deed was established, nothing further would be required than proof of its contents; there would be no occasion for the exercise of any presumption on the subject. It is only where there is uncertainty on this point that the presumption is indulged to quiet the possession."

⁷ *Supra* note 3, at 551. Possession has been held by most courts to be a necessary prerequisite before the doctrine of presumed grant will be applied. In *Mission of the Immaculate Virgin v. Cronin*, 143 N.Y. 524, 38 N.E. 964 (1894), the court refused to presume a grant stating there was no actual or *constructive* possession which the claim would characterize.

⁸ *Supra* note 3, at 552: "This presumption may, therefore, in some instances, be properly invoked where a proprietary right has long been exercised, although the exclusive possession of the whole property, to which the right is asserted, may have been occasionally interrupted during the period necessary to create a title by adverse possession, if in addition to actual possession there were other open acts of ownership." *Williamson & Brown Land & Lumber Co. v. Mullias Lumber Co.*, 249 Fed. 522, 526 (4th Cir. 1918), gives us another view as to the courts' interpretation of possession: "The successive possession for 20 years gives rise to the presumption of a grant to

In broad outline, the above discussion furnishes the basis for a presumption of lost grant. Through the years, the courts have developed more specific elements which must exist before a lost grant will be presumed. In a discussion of these elements, however, it must be remembered that each court applies its own standards, making it impossible to set forth, with any certainty, the prerequisites which are necessary before a grant will be presumed. Indeed, the value of the doctrine of lost grant is enhanced by the flexibility of its application. But, in *general* terms, it is helpful to consider what various elements have been deemed necessary by certain courts.

Most courts agree that color of title is not necessary.⁹ However, the possession must be "adverse." It is not sufficient if possession is consistent with the permission of the holder of proper title.¹⁰ And possession, while it is an essential element, is not of itself determinative, even when accompanied by use. But possession and acts of ownership in connection with other evidence may serve to establish a title by grant, as such evidence renders it *probable* that an actual conveyance was made.¹¹ There must be actual or imputed knowledge to the opposing party. Courts express this idea by saying that there should be acquiescence on the part of the ostensible owner which is best evidenced by nonclaim.¹²

For the most part, courts demand that the claimant use the land and exercise acts of ownership over it. This can take various forms, such as

the first taker at the beginning. Starting with the first taker, the successive adverse possessions may be tacked to make out the full period of 20 years from which a good title is presumed in the last taker against all persons who are strangers in title to the successive possessors in privity with each other claiming the land as their own. This rule, that the possessions of successive holders in privity with each other for 20 years, though without formal deeds of conveyance from one to the other, is sufficient to confer good title on the last holder. . . ."

⁹ *Keel v. Sutton*, 142 Tenn. 341, 219 S.W. 351 (1920). "Possession of land is prima facie evidence of title; the law supposes that it had a legal origin, and when undisturbed for a period of 20 years, it becomes, in view of law, an assurance of title of no less force or efficacy than the actual grant whose place it supplies." *Cannon v. Phillips*, 34 Tenn. (2 Sneed) 118, 120 (1854).

¹⁰ *Superior Oil Co. v. Harsh*, 126 F.2d 572 (7th Cir. 1942); *De Laine v. De Laine*, 211 S.C. 223, 44 S.E.2d 442 (1947).

¹¹ *Tierney v. Second Ecclesiastical Society of North Canaan*, 103 Conn. 332, 130 Atl. 286 (1925). In *Cahill v. Cahill*, 75 Conn. 552, 54 Atl. 201 (1903), the court stated that the possession and acts of ownership are admitted as secondary evidence of an actual conveyance of which the original and best evidence is lost. In other words, the evidence is admitted because it renders it *probable* that there was an actual conveyance.

¹² *Love v. Eastham*, 137 Tex. 462, 154 S.W.2d 623 (1941). In *Abel v. Abel*, 245 Iowa 907, 65 N.W.2d 68 (1954), the court said that because the title holder must have knowledge of the possession and of the claim being made, no presumption of a grant could arise when the title holder is an insane person, confined in a state hospital.

fencing, cultivation, payment of taxes, *et cetera*. In *Koonce v. Woods*,¹³ the court presumed that there had been a redemption from a 1923 forfeiture, with no facts other than that the claimant had paid taxes from 1927 to about 1947 in the manner provided by law. In *Trustees of Schools v. Lilly*,¹⁴ the exclusive possession for eighty years, plus the fencing, cultivation, and use of the land, and the prevailing reputation as to the title in the neighborhood, together with payment of taxes for about seventy-eight years was considered sufficient to establish the presumption of a grant. The presumption was also operative in the case of *Butler v. Johnson*,¹⁵ where evidence was given as to the sale and payment of the purchase price by the claimant and possession by him for more than seven years.

In *general*, then, it may be said that the claimant must be in possession of the land exercising those acts which an owner of land would normally exercise, and there must be actual or *imputed* knowledge to the adverse party. The main consideration, however, as determined from an analysis of the cases employing the doctrine of lost grant, is that the facts of the case are not fit under the rule, but that the rule is applied to fit the facts.

The existence of almost any type of document may be, and for the most part has been, presumed by the courts in applying the doctrine of a lost grant. The United States Supreme Court stated in 1899 that there was hardly a species of act or document, public or private, that would not be presumed in support of possession, and that even acts of Parliament and grants from the Crown could be presumed.¹⁶ The courts have taken the words of the Supreme Court, literally, as can easily be seen from a glance at the various documents which have been presumed by the courts. The issuance of a land patent,¹⁷ an act of the legislature,¹⁸ the execution of a power of attorney¹⁹ and a conveyance from a trustee to a successor trustee²⁰ have all been presumed. The presumption has also been applied

¹³ 211 Ark. 440, 201 S.W.2d 748 (1947).

¹⁴ 373 Ill. 431, 26 N.E.2d 489 (1940). ¹⁵ 180 Ark. 156, 20 S.W.2d 639 (1929).

¹⁶ *United States v. Chavez*, 175 U.S. 509, 523 (1899).

¹⁷ *Malone v. Long*, 128 Md. 377, 97 Atl. 643 (1916), wherein the court presumed a patent because the claimants had possessed the land in question since 1855.

¹⁸ *Trustees of University of South Carolina v. City of Columbia*, 108 S.C. 244, 93 S.E. 934 (1917). The court stated that after the lapse of 20 years of continuous possession, the law would presume consent of the legislature whether the statute could be produced or not.

¹⁹ *Garner v. Lasker*, 71 Tex. 431, 9 S.W.332, (1888).

²⁰ *Kirton v. Howard*, 137 S.C. 11, 134 S.E. 859 (1926), wherein the court presumed that the trustee, whose duty it was to divide the land, had made that division or that the division had at least been made with his consent.

where it had been necessary under the terms of a will that two executors join in the conveyance and the deed was executed by A as executor, and B as executor by A, attorney in fact.²¹ Where an unincorporated religious society had been in possession of land for over thirty years under a lost deed, it was presumed that title was legally conveyed to trustees for the society's benefit, the society being unable to take title to itself.²² All that was necessary for the presumption to be operative in the above situations was the legal possibility that the grant *might* have been issued.

It is the policy of some courts to limit the presumption of grants to situations where possession has endured for a period analogous to that of the statute of limitations.²³ But ordinarily the presumption of a lost grant is not affected by the statute of limitations with regard to the duration of time for which possession must be had in order to give rise to the presumption.²⁴ In general, the statute of limitations does not apply because presumption of a lost grant and adverse possession are of a different nature. Under the doctrine of adverse possession when a party has been in possession of land under a claim of ownership for more than twenty years the statute bars the true owner from dispossessing the claimant, though his possession may have been wrongful and without right; he prevails only because the true owner has not seasonably asserted his right of ejectment.²⁵ The basic distinction is that the presumption of lost grant involves a presumption of the rightfulness of one's possession, while the statute of limitations is only applicable by its terms—when the possession is, apart from the statute, wrongful.²⁶

It would appear that insofar as the presumption might be regarded by some courts as a rule of law,²⁷ calling for the finding of a grant without regard to the actual belief of the jury, it must be supported by a

²¹ *Glenn v. Walker*, 113 S.C. 1, 100 S.E. 706 (1919), wherein the court stated that as long as the deed appeared to be valid on its face, it was not essential to its validity that the deed should recite the power under which the attorney acted.

²² *Reed v. Money*, — Ark. —, 170 S.W. 478 (1914).

²³ *Riffle v. Skinner*, 67 W. Va. 75, 67 S.E. 1075 (1910).

²⁴ *Wadsworthville Poor School v. McCully*, 11 S.C. (Rich.) 424, 430 (1858): "The presumption is independent of the Statute of Limitations; it applies to subjects not within the statute, and it depends on principles which would operate if there were no statute."

²⁵ See *Flannagan v. Mathieson*, 70 Nebr. 223, 97 N.W. 287 (1903).

²⁶ 4 TIFFANY, REAL PROPERTY § 1170 (3rd ed.). *University of Vermont v. Carter*, 110 Vt. 206, 3 A.2d 533 (1939).

²⁷ See *Koonce v. Woods*, 211 Ark. 440, 201 S.W.2d 748 (1947), wherein the court said that after a long lapse of time, a grant by the State will be presumed, not as a matter of fact but one of law.

possession of at least the period of the statute of limitations. However, when the presumption involves merely an inference of the making of a conveyance from the fact of possession, taken in connection with other circumstances,²⁸ a period less than the statute of limitations may be used in aid of the inference. In effect, the presumption of a lost grant has the force and effect of a *prima facie* case and temporarily relieves the party in whose favor it arises from presenting further evidence. It is like all other presumptions of the law, a conclusion which may be rebutted.²⁹

The value of the presumption of lost grant can be best seen when rights of the sovereign are involved. It is clear that the statute of limitations does not run against the United States, the state, or municipal corporations.³⁰ Therefore, the statute of limitations will not avail the claimant of title, no matter how protracted his possession, in a suit against the sovereign.³¹ An individual, however, can get relief by employing the presumption of a lost grant, primarily because it is not based on adverse possession.

Many courts have allowed the use of the presumption of lost grant against the government. In the case of *United States v. Chavez*,³² the title was deficient in direct evidence, and the question was whether the possession of the land over a long period of time supplanted the deficiency. Possession for more than a hundred years was proved to have been respected by Mexico before the territory was ceded to the United States. The Court stated that although neither limitation nor prescription runs against the United States government, a grant will be presumed when there is uninterrupted possession for twenty years. In another case, the Supreme Court stated that the presumption of lost grant will be applied "as a *presumptio juri et de jure*, wherever, by possibility, a right may be acquired in any manner known to the law."³³

Uninterrupted possession of land for fifty years, with payment of taxes during the period, was held to be sufficient to warrant a presumption of fact that the state had made a grant of land, in the case of *Carter v. Stewart*.³⁴ In the case of *Schmeltzer v. Scheid*,³⁵ the court in emphasizing

²⁸ *Supra* note 10, at 574: "The presumption of an ancient grant is not one of law; it is rather a rule of evidence which depends upon questions of fact."

²⁹ In Illinois, it is considered a rebuttable presumption of fact. See *supra* note 14.

³⁰ *United States v. Burnette*, 103 F. Supp. 645 (W.D. N.C. 1952); *Wilkinson v. Watts*, 309 Ill. 607, 141 N.W. 383 (1923); *Engel v. United States*, 258 F.2d 50 (6th Cir. 1958).

³¹ *Ahart v. Wilson*, 211 Ky. 682, 277 S.W. 1007 (1925). See also *supra* note 26.

³² 175 U.S. 509 (1899).

³³ *United States v. Chavez*, 159 U.S. 452, 466 (1895).

³⁴ 149 Ark. 189, 231 S.W. 887 (1921).

³⁵ 203 Ark. 274, 157 S.W.2d 193 (1941).

the state's policy of protecting rights of individuals, who in good faith pay taxes, presumed a lost grant from the state. *Townsend v. Bonner*³⁶ is another case in which the claimant's primary evidence of ownership was that he had paid taxes. The court stated that as the property could only have been entered on the tax books through the action of officers charged with duty, it was reasonable to presume a grant from the state.

For the most part, courts allow the presumption of a lost grant to operate against the government because of the injustice to the individual if there was in fact a grant and such was lost due to the negligence of a governmental official. The Arkansas Supreme Court expressed this idea very aptly in the case of *State v. Taylor*.³⁷ The State of Arkansas, in this case, brought separate suits in ejectment against Taylor and others. The court in denying the suits said:

The record shows that the person from whom Grady purchased the lands bought from the purchaser at the sale, and a preponderance of the evidence shows that the purchase money has been paid. Therefore, it was the duty of the state, through its proper officers, to make the purchaser a deed to the land, and it could not take advantage of its default in this respect to recover the lands.³⁸

The Supreme Court of Illinois allows a grant to be presumed against the state because of the distinction between a title by statutory limitations, and a title by lost grant. The court said the doctrine of lost grant was a rule of evidence and that rules of evidence apply to the State and any of its subdivisions in the same way as to any other litigant.³⁹

*United States v. Fullard-Leo*⁴⁰ is the case which best enunciates the reasons why courts allow the doctrine of lost grant to be employed against the sovereign. The court stated:

The presumption of a lost grant to land has received recognition as an appropriate means to quiet long possession. It recognizes that lapse of time may cure the neglect or failure to secure the proper muniments of title, even though the lost grant may not have been in fact executed. . . . The rule applies to claims to land held adversely to the sovereign. . . . A claim for government lands stands upon no different principle in theory so long as authority exists in government officials to execute the patent, grant or conveyance. As a practical matter it requires a higher degree of proof because of the difficulty for a state to protect its lands from use by those without right.⁴¹

The doctrine of the presumption of a lost grant, when traced to its foundations, is a rule of convenience and policy, the result of a necessary

³⁶ 205 Ark. 172, 169 S.W.2d 125 (1943).

³⁹ *Supra* note 14.

³⁷ 135 Ark. 232, 205 S.W. 104 (1918).

⁴⁰ 331 U.S. 256 (1947).

³⁸ *Id.* at 107.

⁴¹ *Id.* at 273-274.

regard for the peace and security of society. The rule is mainly used to quiet disputes as to title in the manner which the evidence indicates to be equitable. The courts are disposed to apply when possible the same rules to public bodies that they apply to private individuals. Thus the doctrine of lost grant should come to assume an even more important role in the quieting of titles, whether the disputants be public or private.

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